

Hon. Marsha J. Pechman
Plaintiffs' Motion No. 41

CC TO JUDGE DJ

FILED ENTERED

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APR 12 2004 DJ

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WESTERN DISTRICT OF WASHINGTON
DEPUTY

00-CV-00301-M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY BECK, et al.,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. C00-0301P

PLAINTIFFS' MOTION TO
EXCLUDE TESTIMONY AND
ARGUMENT PERTAINING TO
STUDIES AND ANALYSES FOR
EMPLOYEES AS TO WHOM
PLAINTIFFS HAVE BEEN DENIED
DISCOVERY

NOTE ON MOTION CALENDAR:
April 30, 2004

By this motion, plaintiffs seek an order excluding Boeing witnesses from testifying about analyses or studies regarding groups of employees for which plaintiffs were denied discovery. As is explained below, such testimony is properly excluded under Fed. R. Civ. P. 37(c)(1).

In their depositions, Boeing witnesses have testified that they did not believe there was intentional discrimination at Boeing, or any discrimination at all, because of analyses conducted for Boeing's engineers and for Boeing's Philadelphia site. *See* Exs. A, B.¹ Boeing, however, has refused to produce the work histories or electronic data pertaining to

¹ Unless otherwise stated, all cited exhibits are attached to the Declaration of Michael D. Helgren submitted herewith.

PLAINTIFFS MOTION TO EXCLUDE EVIDENCE OF
EMPLOYEES AS TO WHOM PLAINTIFFS WERE
DENIED DISCOVERY (No. C00-0301P) - Page 1

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1 its engineers or for its Philadelphia employees. As such, plaintiffs have never been able to
 2 test Boeing's witnesses' self-serving testimony on these subjects.

3 Plaintiffs did seek this information. Their initial discovery requests sought the
 4 production of company-wide data and work histories that would have included engineers
 5 and Philadelphia. Boeing objected, but did not state that it intended to call witnesses to
 6 give "their impression" of the discrimination at the Philadelphia site and for the engineers.
 7 Not knowing that Boeing would later make use of such evidence, the Special Master ruled
 8 that Boeing did not have to provide electronic data or the work histories for groups not
 9 containing named plaintiffs. *See* Ex. C. According, Boeing did not produce work
 10 histories or electronic data regarding engineers or Philadelphia employees and plaintiffs
 11 have not received such information for these groups. As a result, plaintiffs have never
 12 been able to test Boeing's self-serving assertions as to its engineers and Philadelphia
 13 employees.

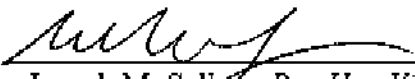
14 Where, as here, Boeing has not produced the evidence needed for plaintiffs to test
 15 self-interested, self-serving statements, it should be precluded from introducing such
 16 statements or arguments at trial. Under Fed. R. Civ. P. 37(c)(1), a party that fails to
 17 disclose information required by Rule 26(a) or 26(e) is generally not "permitted to use as
 18 evidence a trial...any witness or information not so disclosed." *See also Zhang v.*
 19 *American Gem Seafoods, Inc.*, 339 F.3d 1020, 1027-28 (9th Cir. 2003). At trial, therefore,
 20 Boeing's witnesses should not be permitted to testify about any analyses or studies
 21 regarding Boeing's engineers or its Philadelphia employees.

22 DATED this 12th day of April, 2004.

23 McNAUL EBEL NAWROT HELGREN
 24 & VANCE PLLC

25 By: 
 26 Michael D. Helgren, WSBA No. 12186

COHEN, MILSTEIN, HAUSFELD & TOLL,
P.L.L.C

By 
Joseph M. Sellers, *Pro Hac Vice*
Christine Webber, *Pro Hac Vice*

Attorneys for Plaintiffs

PLAINTIFFS MOTION TO EXCLUDE EVIDENCE OF
EMPLOYEES AS TO WHOM PLAINTIFFS WERE
DENIED DISCOVERY (No. C00-0301P) – Page 3

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1 **CERTIFICATE OF SERVICE**

2 On April 12, 2004, I caused to be served upon counsel of record, at the address
3 stated below, via the method of service indicated, a true and correct copy of the foregoing
4 document:

5
6
7 Ms. Nancy Williams
Perkins Coie LLP
Suite 4800
1201 Third Avenue
8 Seattle, WA 98101

9 ☒ Via hand delivery
Via U.S. Mail, 1st Class,
Postage Prepaid
Via Overnight Delivery
Via Facsimile
Via E-filing

10
11 Mr. C. Geoffrey Weirich
Paul, Hastings, Janofsky & Walker LLP
Suite 2400
12 600 Peachtree Street NE
13 Atlanta, GA 30308

14 ☒ Via hand delivery
Via U.S. Mail, 1st Class,
Postage Prepaid
Via Overnight Delivery
Via Facsimile
Via E-filing

15 I certify under penalty of perjury under the laws of the United States of America
16 and the State of Washington that the foregoing is true and correct.

17 DATED this 12th day of April, 2004, at Seattle, Washington.

18
19 
20 Melissa L. Peterson, Legal Assistant

Hon. Marsha J. Pechman
Plaintiffs' Motion No. 41



00-CV-00301-DECL

CC TO JUDGE DJ
FILED ENTERED
LODGED REC'D
APR 12 2004 DJ

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY BECK, et al.,

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. C00-0301P

DECLARATION OF MICHAEL D.
HELGREN

The undersigned declares under penalty of perjury under the laws of the United States of America and the State of Washington that the following statements are true, correct and based on personal knowledge.

1. I am one of the attorneys for the plaintiffs and I have personal knowledge of the matters below.

2. Attached hereto are true and correct copies of the originals thereof:

Exhibit A Excerpts of the Declaration of Marcella R. Fleming, dated May 31, 2001;

Exhibit B Excerpts of Defendants' Memorandum In Opposition to Plaintiffs' Motion for Class Certification, dated June 1, 2001; and

DECLARATION OF MICHAEL D. HELGREN (No.
C00-0301P) - Page 1


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Exhibit C

Excerpts of the Special Master's Order Re:
Discovery Motions and Recommendations, dated
October 25, 2000.

DATED this 12th day of April, 2004, at Seattle, Washington.


Michael D. Helgren, WSBA No. 12186

DECLARATION OF MICHAEL D. HELGREN (No.
C00-0301P) – Page 2

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1 **CERTIFICATE OF SERVICE**

2 On April 12, 2004, I caused to be served upon counsel of record, at the address
3 stated below, via the method of service indicated, a true and correct copy of the foregoing
4 document:

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24 I certify under penalty of perjury under the laws of the United States of America
25 and the State of Washington that the foregoing is true and correct.

26 DATED this 12th day of April, 2004, at Seattle, Washington.

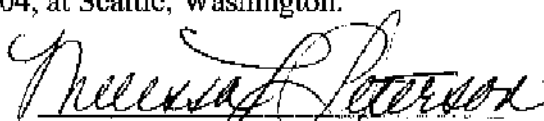

Melissa L. Peterson, Legal Assistant

Exhibit A

THE HONORABLE MARSHA J. PECHMAN
Plaintiffs' Motion No. 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY BECK, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.,

Defendants.

NO. C00-0301P

DECLARATION OF
MARCELLA R. FLEMING

I, Marcella R. Fleming, declare as follows:

PERSONAL BACKGROUND AND PURPOSES OF DECLARATION

1. I am employed by The Boeing Company ("Boeing" or the "Company") as its Director, Employee Relations, Company Offices. I have held this position since June 1997. Prior to taking my current job, I served as Staff Counsel in Boeing's Office of the General Counsel. Before joining Boeing in 1994, I worked as an attorney in private practice for six years. I received my J.D. from the University of Virginia Law School in 1988. I make this declaration based on personal knowledge and on records I have reviewed in the course of my work with Boeing. Reference in some cases to specific portions from my eight days of

DECLARATION OF
MARCELLA R. FLEMING - 1

[03002-0696/SL011510.039]

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1 limited number of job titles in some locations; most job titles in most locations showed no
2 statistical significance or could not be analyzed due to insufficient sample size. Baker Dep.,
3 2/15/01 at 113-15. Again, notwithstanding its awareness that the Comp 95 model had serious
4 deficiencies, Boeing decided to provide additional funds during its annual salary reviews for its
5 NSP and management employees to reduce the as-yet unexplained differences in the groups
6 where they were identified. The supplemental funds were again distributed (in October 1995
7 for NSP and in April 1996 for managers) consistent with employees' performance, and the
8 relationship of their salaries to the market and peers. There was no finding or conclusion that
9 the differences were the result of illegal discrimination. Fleming Dep., 1/5/01 at 805-06.

10
11 22. Boeing shared the facts of its analysis with its employees. The articles
12 comprising Exhibit E-5 are from official Boeing publications discussing the Comp 95 analyses.
13 At the conclusion of the Comp 95 project, Boeing believed that it had identified and
14 eliminated any differences in pay by gender that had been identified, though it understood that
15 the limitations on the information available just to compare its own jobs made it impossible to
16 be certain whether these adjustments overcompensated or undercompensated for any gender
17 differences in pay that might exist. Fleming Dep., 1/5/01 at 895-96; 2/7/01 at 946.

18
19 23. After completing this initial round of self-analysis, Boeing has continued to
20 monitor its compensation using the models developed for the Engineering/Technical, NSP,
21 and management payrolls. The Company also began a comprehensive review of its
22 compensation policies and practices. See generally Fleming Dep., 1/4/01 at 546-50, 554-67.

23
24 24. One important conclusion Boeing reached from this analytical experience is
25 that when the Company is able to account accurately for employees' relevant pre-Boeing work
26 experience, significant pay differences between men and women are not found. Boeing has,
27 for example, reliable and detailed information about the relevant prior work experience of its

1 SPEAA-represented engineers. Baker Dep., 2/16/01 at 169. When this information has been
2 utilized in post-1995 regression analyses of engineers' pay, there has been little, if any,
3 significant difference identified between the compensation of men and women. See Marshall
4 Dep., 3/15/01 at 115 (in 1999, using precise prior experience data for the SPEEA engineers
5 "the difference that we had seen went to zero. And so we knew you had to have good data on
6 something like that, and we simply did not have any practical way to get it" outside the
7 engineering population). This finding was further supported during the work in 1998 with
8 respect to the OFCCP's audit at the Ridley Park, PA facility. In that case, after doing a folder-
9 by-folder review to gather information about relevant prior experience, significant differences
10 in the pay of similarly situated men and women that had appeared to exist before analyzing
11 this factor went away. Fleming Dep., 1/5/01 at 734; 4/6/01 at 1188-89, 1215-16.
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23 25. Reliable electronic data on employee experience is not available outside the
24 engineering payroll. Id. Thus, analyses of most of the Boeing salaried population based on
25 existing electronic data are unable to control accurately for relevant prior experience and are
26 forced instead to use some proxy variable, such as age. Such proxies, however, do not
27 accurately account for any gender differences in prior experience, such as may be caused by
28 differences in the average time spent out of the workforce in the two populations being
29 compared. To the extent that men and women may, for a variety of reasons, spend different
30 amounts of time out of the workforce, on average, this cannot be accounted for entirely in an
31 analysis using age as the proxy variable. Thus, to the extent these average differences exist,
32 an analysis that cannot control for them will tend to overstate female experience which, under
33 the analysis, will make it appear that women should be paid more than they are being, or
34 should be, paid. Baker Dep., 2/16/01 at 200-01.
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1 as well as pending litigation at the time. taking the unpublicized approach to supplemental
2 funding was believed to lessen litigation risk. In light of the use made by plaintiffs in this case
3 of Boeing's affirmative action approach to compensation differences, I do not think it can be
4 argued that Boeing was unreasonable in its litigation concerns.
5
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9 65. Attached as Exhibit E-6 to this declaration is the discrimination charge from
10 Boeing's files submitted by Verlene Maholmes. To my knowledge, this charge, dated
11 January 23, 2000, is the earliest charge containing class allegations filed by a plaintiff in this
12 litigation.
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16 I declare under penalty of perjury under the laws of the United States and the State of
17 Washington that the foregoing is true and correct.
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20 Signed this 31st day of May 2001 at Seattle, Washington.
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25 MARCELLA R. FLEMING
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DECLARATION OF
MARCELLA R. FLEMING - 33

[03002-0696/SL011510.039]

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Exhibit B

THE HONORABLE MARSHA J. PECHMAN
Plaintiffs' Motion No. 22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARY BECK, et al.,

Plaintiffs,

v.

THE BOEING COMPANY, et al.,

Defendants.

C00-0301P

DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION

FILED UNDER SEAL

DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION

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1 worked, not overtime offered. Siskin Dep. at 342, 361; Ward Dec. p. 59. His implicit assumption
 2 that men and women equally accept voluntary overtime is inconsistent with labor force literature
 3 showing that women, on average, work "fewer hours per week." Ward Dec. p. 61 & App. F.
 4
 5 Indeed, Dr. Siskin agreed that a preference for less overtime by women could explain the
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 7 disparities he found in his analysis. Siskin Dep. at 344-45; 355-57. Dr. Ward did not present any
 8
 9 responsive statistical analyses of overtime because Dr. Siskin's wholly inapt analyses prove
 10
 11 nothing, and because the actual practices used for allocating overtime are not capable of any
 12
 13 legitimate analysis using the available computerized data. Ward Dec. pp. 59-61.
 14

15
 16 **Compensation.** Nor do plaintiffs' flawed salaried compensation analyses support a
 17
 18 finding of commonality. Dr. Ward's analyses of annual salary show no patterns consistently
 19
 20 adverse to women. Rather, for managers, SPEEA Technical employees, SCPEA employees, and
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 22 nonrepresented salaried employees in paycodes 2 and 6, he found that in some years, in some
 23
 24 locations, women were paid less than similarly situated men, and in other years and locations they
 25
 26 were paid more. Id. ¶¶ 40-49. Some of the results (both favorable and unfavorable to women) are
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 28 statistically significant, but more often they are not. Id. For the nonunion engineers in St. Louis,
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 30 he observed that women were paid *more* than expected in every single year, and at a statistically
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 32 significant level in 1998, 1999, and 2000. Id. ¶¶ 49-50.
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 35 Plaintiffs cannot dispute that pre-hire experience is a powerful explanatory factor for
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 37 current salary level. For example, when Boeing studied the pay of the SPEEA-represented
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 39 salaried engineers, for whom data on when they earned a BS degree is available, the Company
 40
 41 found no salary disparities consistently adverse to women. Fleming Dec. ¶ 24; Marshall Dep.,
 42
 43 3/15/01, at 115. Because such pre-hire information is not available for most employees, both
 44
 45 parties' experts used a proxy for pre-hire experience in their analyses. Siskin Dep. pp. 146-49;
 46
 47 Ward Dec. pp. 38-39. Before deciding to use starting salary as his proxy, however, Dr. Ward took

1 notion. Plaintiffs' enormous, diverse, and utterly unmanageable sets of claims and putative class
2 members cannot properly be treated as a class action. Their motion should be denied.
3

4
5 DATED: June 1, 2001.
6

7 PERKINS COIE LLP
8

9
10 By Jeffrey A. Hollingsworth
11 Lawrence B. Hannah, WSBA #3761
12 Jeffrey A. Hollingsworth, WSBA #11853
13 Nancy Williams, WSBA #11558
14

15
16 PAUL, HASTINGS, JANOFSKY & WALKER LLP
17

18
19 By Maureen O'Neill for Barbara B. Brown
20 Barbara Berish Brown, D.C. Bar #355420
21 1299 Pennsylvania Ave., NW
22 Washington, DC 20004
23

24
25 C. Geoffrey Weirich, GA Bar #746455
26 600 Peachtree St. NE
27 Atlanta, GA 30308-2222
28

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30 Attorneys for Defendants
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DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION - 35

[03002-0696/SL011510.059]

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Exhibit C

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MONTGOMERY
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NAWROT HELGREN & VANCE PLLC.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BECK, et al.,

Plaintiff(s),

v.

THE BOEING COMPANY, et al.,

Defendant(s).

NO. C00-301P

SPECIAL MASTER'S ORDER RE:
DISCOVERY MOTIONS AND
RECOMMENDATIONS

By "Order re: Appointment of Special Discovery Master" dated September 8, 2000, the Court designated the undersigned "special discovery master" pursuant to Fed.R.Civ.P. 53 to supervise the remainder of discovery. The Court directed and empowered the special master "to make such findings, conclusions, recommendations and orders in regard to discovery as he deems appropriate in the manner provided for by law, by the Federal Rules of Civil Procedure and by the local rules of this Court."

The Court's September 8, 2000 Order and its Minute Order dated September 12, 2000 referred all pending discovery motions to the special master. The Court also requested that the special master make recommendations regarding the scheduling of case events, the continuation of the special master for further discovery motions, and the management of the data and other information produced in discovery.

SPEC DISC MASTER'S ORDER - 1

COPY

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2 government agency investigations) and that confidentiality is crucial to the effective resolution of
3 complaints.

4 The great burden and expense of providing the exhaustive complaint documents requested by
5 plaintiffs, as well as the probability of substantial delay in class certification consideration that would
6 be caused by records gathering, privilege review, and privilege rulings, outweigh the potential
7 probative value of the discovery plaintiffs request. Plaintiffs' motion to produce additional EEO files
8 is denied.

9
10 *Plaintiffs' Motion No. 10: "Plaintiffs' Motion to Compel Production for a Company-Wide Class"*

11 Plaintiffs' Motion No. 10 requests an order compelling "the production of certain documents
12 and data relating to a company-wide class of women employees."

13 Plaintiffs assert that defendants have refused to permit discovery relating to the potential
14 company-wide class and have instead provided discovery only as to certain categories of employees
15 at a limited number of facilities. Plaintiffs complain that defendants' production has resulted in
16 plaintiffs receiving only a patchwork of data on different types of workers at different facilities.

17 In plaintiffs' view, defendants' production has excluded potential evidence of company-wide
18 discriminatory actions outside the particular groups in which the 38 named plaintiffs work, and such
19 exclusion may frustrate the Court's efforts to fairly consider class certification. Plaintiffs express
20 concern that defendants already have urged the court to deny class certification based on multiplicity
21 of collective bargaining agreements and conflicting policies at different locations around the country.
22 Without full discovery, plaintiffs complain, defendants' argument cannot be tested.


23 Defendants respond that they have already provided electronic data covering approximately
24 140,000 of 172,000 employees, as well as more than 24,000 pages of employment policies and
25

1
2 manuals, and that, especially at this pre-certification stage, there is no justification for the expanded
3 discovery requested by plaintiffs.

4 In their September 7, 2000 Memorandum on pending discovery motions, at 20, defendants
5 stated that, assuming *arguendo* that plaintiffs could identify a company-wide policy or practice
6 resulting in widespread discrimination against women employees within what defendants label
7 Groups Containing Named Plaintiffs ("GCNPs"), defendants would not argue to exclude women
8 outside the GCNPs, who are subject to the same policy or practice, on the grounds that plaintiffs lack
9 detailed evidence relating to the geographic locations and collective bargaining units lacking any
10 discernible nexus to any of the 38 named plaintiffs. During oral argument defendants declined to
11 agree to forego future arguments against class certification based on the multiplicity of CBAs and
12 conflicting policies as to groups *not* containing named plaintiffs.

13 Limited production of documents and data on a company-wide basis is appropriate and
14 necessary to permit plaintiffs to respond to Defendants' plausible argument that the multiplicity of
15 jobsites, CBAs, policies, etc. should defeat class certification. Defendants are directed to produce
16 on a company-wide basis, within 30 days of the date of this Order, the documents ordered to be
17 produced in the discussion of Plaintiffs' Motion No. 8, Para. 2, above., *Affirmative Action*
18 *Plans/Employee-Related Policies/Gender Discrimination Studies*. (That is, defendants are directed to
19 produce all gender-related: AAPs, employment policies; reports, studies, or employee surveys; as
20 well as any analyses comparing the economic benefits and opportunities provided by defendants to
21 male employees with those provided to female employees.) In other respects plaintiffs' Motion No.
22 10 is denied as unduly burdensome. (See discussion of Motion No. 8, above.)
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8 Dated this 25th day of October, 2000
9

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11 
12 _____
13 George A. Finkle (Judge, retired)
14 Special Discovery Master
15
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Hon. Marsha J. Pechman
Plaintiffs' Motion No. 41

CC TO JUDGE DJ

FILED _____ ENTERED _____
LODGED _____ REC'D _____

APR 12 2004 DJ

00-CV-00301-PRO

AT SEATTLE
CLERK U.S. DISTRICT COURT
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BY _____ DEPUTY

UNITED STATES DISTRICT COURT
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MARY BECK, et al.,

Plaintiffs,

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No. C00-0301P

[PROPOSED] ORDER GRANTING
PLAINTIFFS' MOTION TO
EXCLUDE TESTIMONY AND
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STUDIES AND ANALYSES FOR
EMPLOYEES AS TO WHOM
PLAINTIFFS HAVE BEEN DENIED
DISCOVERY

THIS MATTER came before the Court on Plaintiffs' Motion to Exclude
Testimony and Argument Pertaining to Studies and Analyses for Employees as to Whom
Plaintiffs Have Been Denied Discovery. The Court has reviewed the records and files
herein, including plaintiffs' motion and defendant's response, and plaintiffs' reply, if any.
Now being fully advised,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Exclude Testimony and
Argument Pertaining to Studies and Analyses for Employees as to Whom Plaintiffs Have
Been Denied Discovery is GRANTED.

DATED this _____ day of _____, 2004.

THE HONORABLE MARSHA J. PECHMAN

[PROPOSED] ORDER GRANTING PLAINTIFFS'
MOTION No. 41 (No. C00-0301P) - Page 1

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1
2 Presented By:

3 McNAUL EBEL NAWROT HELGREN
4 & VANCE, P.L.L.C.

5 By: 

6 Michael D. Helgren, WSBA No. 12186

7 Attorneys for Plaintiffs
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[PROPOSED] ORDER GRANTING PLAINTIFFS'
MOTION No. 41 (No. C00-0301P) – Page 2

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